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SUPREME COURT OF THE UNITED

OCTOBER TERM, 1940.

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No. 78

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A. O. FROST & COMPANY,

*Petitioner*

*vs.*

COEUR D'ALENE MINES CORPORATION,

*Respondent*

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# Supplemental Brief for Respondent

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1940

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*Respondent.*

## Supplemental Brief for Respondent

The Supreme Court of the State of Idaho, after first deciding that the option contract, which is the sole basis for both of petitioner's causes of action in this case was made in violation of the Securities Act of 1933, ruled that a contract entered into in violation of a statute is unenforceable by either of the parties thereto in the courts of Idaho. (98 Pac. (2d) 965.) Respondent submits that this decision of the State court is a matter of the local common law of the State of Idaho, and presents no Federal question.

Respondent briefly presented this contention in its Brief in Opposition to Petition for Writ of Certiorari (p. 11-13 incl.), but it was not included in the Brief for Respondent.

However, respondent had no intention of abandoning its firm conviction that the refusal of the State court to enforce this illegal contract is based on Idaho common law and thus beyond the scope of inquiry of this court; and, after further consideration, respondent desires to present in more detail to this court its reasons for its opinion.

Throughout this discussion it will be assumed that this option agreement, here under consideration, is in violation of the Securities Act of 1933. (See Brief of Respondent, pp. 6-14 incl.) The State trial court and the Supreme Court, after ruling that the contract violated the Securities Act and was, therefore, unlawful and illegal, then proceeded to hold that the contract is unenforceable in the Idaho courts.

Petitioner, in its Brief (pp. 1-2), asserts that both of these points, vis. (1) that the contract is in contravention of the Securities Act, and (2) that an action on the contract cannot be maintained, raise substantial Federal questions, and attempts to found the jurisdiction of this court on Section 237 (b) of the Judicial Code as amended.[1] We are herewith concerned only with the second point, and respondent earnestly contends that the State Supreme Court's decision that a contract made in violation of a statute cannot be enforced raises no Federal question, and this court has no jurisdiction to review or disturb that ruling.

Petitioner, in its Brief (p. 2), states as follows:

> The Supreme Court of the State of Idaho founded its decision on its interpretion of the Securities Act of 1933, holding that a contract for the sale of stock not registered under the Securities Act of 1933 is void as violative of the spirit or intent of the Act, and that the transaction is not exempted by that Act."

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[1] §237 (b) Judicial Code as Amended, 28 U. S. C. A. 344 (b): "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified

An examination of the opinion of the State court discloses that the above-quoted statement is erroneous. It is true that the State court, in determining whether or not this contract was in violation of the Securities Act, considered the Act and applied it to the facts in this particular case. But it is not true that the court based its decision that it will not enforce this contract on its interpretation of the Act or because it believed its non-enforcement was required by the spirit or intent of the Act.

The Idaho Supreme Court said (98 Pac. (2d) 965, 968):

> "It should be born in mind that the option agreement is void because prohibited by law. The well established rule is that if the contract is void because prohibited by law or as against public policy the courts will leave the parties in the identical situation in which it finds them,

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to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

and the contract cannot be treated as valid by invoking estoppel."

Again, the Court said, at page 968:

> "In Libby v. Pelham, 30 Ida. 614, 166 Pac. 575, this court determined that rights based on a violation of law will not be enforced, and if a transaction is illegal because in contravention to a statute, it will not be upheld in any way, but the parties will be left in the situation in which they have voluntarily placed themselves."

Quoting from McManus vs. Fulton, 85 Mont. 170, 278 Pac. 126, 131, 67 A. L. R. 190, the Idaho court said:

> The great weight of authority is that where a party comes into court seeking to enforce a contract which is against public policy or is prohibited by public law, the court will refuse to aid either party and will leave them where they have placed themselves, and in refusing to enforce such contracts the court does not act for the benefit, or for the preservation of the alleged rights, of either party, but in the maintenance of its own dignity, the public good and the laws of the state."

Thus, it decisively appears that the Idaho court held that it will not enforce a contract which is declared unlawful by statute. In so doing it acted within its proper judicial authority by declaring as a matter of state law it will cast down illegal contracts and disregard the pleas of those who are parties to them. The opinion shows that the court did not reach this conclusion as a matter of construction of the Federal statute. It is conceded that the Securities Act does not, in so many words, declare that all contracts made in violation thereof shall be void. Nor did the State court attempt to determine the meaning or intent of Congress in passing the Act. It simply held that it will not demean its dignity by giving judicial sanction to a contract declared by statute to be unlawful (Securities Act of 1933, Sec. 5, see Brief of

Respondent, pp. 22, 23), and a violation of which carries a criminal penalty. (Securities Act of 1933, Sec. 24, see Brief of Respondent, p. 24.)

The Idaho court ruled that the parties to such a contract have no call upon the courts of that state to recognize their unlawful acts or to degrade their powers by giving them redress. This is essentially a matter of the common law of the State of Idaho. No construction of a Federal statute is involved. No application of a Federal statute is invoked nor necessary. It would seem improper and unauthorized for this court now to say to the Idaho court that it does not have the right to declare that it will not enforce unlawful contracts, that it must approve illegality in the face of established doctrine to the contrary.

In holding that an action on an illegal contract cannot be maintained, the State court did not create a new rule of common law in Idaho. It has long been firmly established in the jurisprudence of that State, and, since its original declaration, has been rigidly adhered to.

Libby v. Pelham, 30 Ida. 614, 166 Pac. 575 (1917);
McFall v. Arkoosh, 37 Ida. 243, 215 Pac. 978 (1923);
Deer Creek H. Dist. v. Doumecq H. Dist., 37 Ida. 601, 218 Pac. 371 (1923);
Cf. McConnon v. Holden, 35 Ida. 75, 204 Pac. 656 (1922).

However, it would make no difference if this case were the original promulgation of this doctrine in this State. The Idaho Supreme Court has now ruled in this particular case that under the common law of Idaho this illegal contract is unenforceable. The declaration of the State common law by the highest court of the State is binding on the Federal

courts, and this Court has no jurisdiction to review this decision, whether it is right or wrong.

> Arkansas So. Ry. Co. v. German Nat. Bank, 207 U. S. 270, 51 L. ed. 201 (1907).

Even though it be conceded that a Federal question is presented by the decision of the State court that this contract is not exempted from the provisions of the Securities Act of 1933 because it does not involve a public offering (§4 (1) see Brief of Respondent, p. 22), nevertheless, the question of whether the State court will enforce an illegal contract is one of local State law and presents no Federal question. This court may consider only the Federal question presented in a case, and as to all non-Federal questions it is bound by the decisions of the State court.

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on Federal questions; * *"
>
> Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680, 74 L. ed. 1107, 1113 (1930).

This court has no jurisdiction nor authority to review questions of local common law.

> Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229 (1916);
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> American Ry. Express Co. v. Kentucky, 273 U. S. 269, 71 L. ed. 639 (1927);
>
> Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. ed. 158 (1935).

Section 237 (b) of the Judicial Code, as amended, confers jurisdiction on this court to review decisions of State courts where any title, right, privilege or immunity is specially set up or claimed under a statute of the United States. The only

statute involved in the case at bar is the Securities Act of 1933 and, obviously, it neither expressly nor by inference confers on petitioner any title, right, privilege or immunity under which petitioner could assert that it is entitled to force the State court to enforce its illegal and unlawful contract.

Neither, on the other hand, does respondent assert, nor does the State court hold, that this contract is unenforceable because of any express declarations of the Securities Act, nor any inference that may be drawn therefrom. The Idaho Supreme Court merely asserted its own prerogative, conferred upon it by its sovereign state, in holding that, as a matter of local law and public policy, illegality will not be tolerated, malefactors may not use the courts to accomplish their odious purposes nor to reap the benefits thereof, and the maxims, "Ex dolo malo non oritur actio", and "In pari delicto potior est conditio defendentis", are established as the common law of this State.

This court has no jurisdiction, power, or authority to disturb this decision.

Respectfully submitted,

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